

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF:

**FRATERNAL ORDER OF POLICE,
LODGE # 5**

AND

**Re: Demotion of John Mulholland
AAA Case No. 14 390 617 12**

CITY OF PHILADELPHIA

OPINION AND AWARD OF ARBITRATOR

Hearing Date: March 27, 2013

Arbitrator: Thomas G. McConnell Jr.

Appearances:

For the FOP:

Marc L. Gelman, Esq.

For the City:

Cara E. Leheny, Esq.

PROCEDURAL HISTORY

This is a grievance arbitration proceeding involving the Fraternal Order of Police, Lodge # 5 (FOP) and the City of Philadelphia (City). A hearing was held on March 27, 2013, at which time the parties were given a full opportunity to present their cases. The parties made closing statements at the hearing.

ISSUES

The parties were able to stipulate to the issues in this matter: Whether the City had just cause to demote the grievant, John Mulholland? If not, what shall the remedy be?

FACTUAL BACKGROUND AND PROFFERED EVIDENCE

Testimony of Officer L [REDACTED]

On April 9, 2010, Officer E [REDACTED] L [REDACTED] and his partner, K [REDACTED] D [REDACTED], were at the Police Detention Unit, dropping off a prisoner, when a corporal there asked them to take another prisoner to Frankford Hospital South-Aria. The prisoner caused a lot of difficulty when the officers got her into the bay to enter the wagon. The prisoner was handcuffed at the time. The behavior included dropping down and insisting she wanted to take the next wagon. She also grabbed on to the bench. It took about six officers to get her away from the bench. The woman was irate, yelling and screaming. This yelling and screaming continued during the course of the trip. L [REDACTED] described this conduct in more detail on cross-examination, indicating that the prisoner was violent and combative from the outset. Due to this volatile behavior, D [REDACTED] then went on radio to request that a car meet them at the hospital.

There is conflicting evidence as to how the prisoner behaved upon arrival at the hospital. L [REDACTED] testified at the arbitration that she was being combative as the officers

took her into the hospital. This testimony, however, is clearly in contrast to all other evidence of record, including L's own statement taken by Internal Affairs in May 2010. As L was clearly a credible witness otherwise, I believe his recollection was simply hampered by the fact that the incident took place in April 2010, and that he testified at the arbitration in March 2013. Thus, while I do not believe it is a particularly critical point, I have found as fact that the prisoner was relatively calm as she was taken into the hospital.

As the officers were taking the prisoner back out to the wagon, after her treatment, she engaged in significant resistance as she was being moved toward the wagon. It required significant effort from several officers to even get her into the wagon. Once in the wagon, L was forced to use his ASP on the prisoner a few times in order to get the prisoner under control. This was precipitated by the prisoner's continued attempt to get a hold of L's leg and to bite him. L testified that, despite being hit with the ASP several times, the prisoner never fell back. L testified that the prisoner was not successful in biting anyone. As will be stated in more detail below, Mulholland went into the wagon to assist.

At some point, the prisoner did rip off L's tie and nametag. Once getting the prisoner under control in the wagon, the officers then faced the unenviable task of taking the prisoner back into the hospital, as since she was hit with the ASP she needed to be examined and if necessary treated. The prisoner remained in the wagon alone for ten to thirteen minutes as Mulholland determined that it might be helpful to have her calm down before attempting to get her back into the hospital. Ultimately, Mulholland went back into the wagon himself, and as demonstrated in the video entered as City Exhibit 1, before doing so he took off his jacket and shirt.

L ■ testified that he could see into the wagon when Mulholland went in to get the prisoner, but that he could not recall whether the prisoner was resisting. L ■ recalled that Mulholland was angry, and said words to the effect of, "you got my officers hurt," apparently in reference to the fact that officers called to assist at the hospital were involved in a serious accident en route. Mulholland then dragged the prisoner out by her feet, and onto the ground. L ■ testified that the prisoner was calm at that point, and was not attempting to bite anyone or hit anyone. L ■ testified that, at that point, the prisoner was "kind of" sitting up with her back to the wagon. L ■ had an unobstructed view at that point. L ■ testified that, while the prisoner was on the ground, Mulholland struck the prisoner two or three times. At that point, L ■ moved in front of Mulholland and told Mulholland to let the officers put her on the gurney. L ■ then stayed with Mulholland and thereafter L ■ and the other officers got the prisoner on the gurney and wheeled her in the hospital.

Testimony of Officer B ■

Officer B ■ was also present at the scene, from the time the prisoner arrived until the incident at issue. B ■ acknowledged on cross-examination that the prisoner was highly combative, and was resisting the commands of the officers. B ■ testified that she witnessed the prisoner trying to bite L ■ and Mulholland in the wagon. B ■ acknowledged on cross-examination that, in a statement given to detectives on the morning of the incident, she stated that the prisoner did threaten Mulholland at one point. At one point, B ■ assisted L ■ by grabbing the prisoner's head so that she would not be in a position to bite him. B ■ testified that, once on the ground, outside the wagon, the prisoner was calm, and was not "doing anything." B ■ testified that Mulholland then struck

the prisoner, more than once. B [REDACTED] testified that the prisoner was lying on the ground when Mulholland struck her. B [REDACTED] testified that she was within five feet of Mulholland and the prisoner when he struck the prisoner.

Testimony of D [REDACTED] S [REDACTED]

Officer S [REDACTED] testified that he was dispatched to go to Frankford Hospital South-Aria. When he arrived, he saw a group of officers at the back of the wagon. S [REDACTED] testified that he saw Mulholland over the prisoner, and that he and the prisoner were yelling at each other. S [REDACTED] testified that he saw Mulholland strike the prisoner, though he was not sure how many times. S [REDACTED] testified on cross-examination that, as the officers were wheeling the prisoner back into the hospital, after the incident at issue, one of the officers had his taser out. S [REDACTED] testified that this gave him some knowledge that the prisoner was combative. S [REDACTED] then talked to other officers and learned more about what had transpired.

Testimony of Officer Mulholland

Officer (then Sergeant) Mulholland was at Frankford Hospital responding to another issue when he received word that a wagon was coming with a prisoner. Upon arrival, Officers L [REDACTED] and D [REDACTED] told Mulholland that the prisoner "was a fighter." Upon further inquiry, Mulholland discovered that the prisoner had been locked up two days before for assaulting two police officers and a juvenile. Mulholland understood at the time that the prisoner required treatment at the hospital before she could be transported to a correctional facility.

Mulholland testified that the prisoner did not cause any issues upon being taken into the hospital. Mulholland testified that he was present "off and on" in the treatment area. Mulholland testified that he heard the prisoner say that she she liked to get high

on PCP because it made sex better and because she could fight and not feel any pain. Mulholland testified that this concerned him, as he had prior experience with individuals on PCP, and the experience was difficult. Specifically, Mulholland related that such individuals tend to have incredible strength, and do not feel any pain when the force continuum was applied. Mulholland further testified that such individuals typically do not respond to verbal commands.

Mulholland testified that, following treatment, the prisoner was doing fine until the officers got her through the hospital exit doors. At that point, the prisoner began yelling and throwing herself to the ground. She was essentially "dead weight" and none of the officers could get a good grip on her. At that point, Mulholland, who was observing, then went on radio and asked for a couple of extra units to respond.

Mulholland continued to observe as the officers struggled to get the prisoner into the wagon. Once the officers got the prisoner into the wagon, L [REDACTED] in particular had difficulty getting out, as the prisoner grabbed his leg, and perhaps had the cuffs wrapped around his ankle. Mulholland heard B [REDACTED] say, "she is trying to bite," and at that point Mulholland decided to physically assist. Mulholland had difficulty getting a grip on the prisoner, as she was very wet from sweating. Mulholland was attempting to keep the prisoner from biting L [REDACTED], whose achilles tendon was exposed. The prisoner was also attempting to bite Mulholland. Officers B [REDACTED], S [REDACTED], and P [REDACTED] assisted in getting the prisoner to let go of Officer L [REDACTED] and ultimately the officers left the wagon without any serious injuries.

As indicated above, after the prisoner was removed from the wagon, policy required that she be taken back into the hospital for an examination. This was due in large part to the fact that L [REDACTED] was forced to use his ASP on her while in the wagon.

Mulholland then made the decision to let the prisoner "calm down" for a few minutes before taking her into the hospital.

After waiting a period of time, Mulholland made the decision to take the prisoner out of the wagon, himself, without assistance of the other officers present. Mulholland testified that he did so because he wanted to protect the other officers, particularly since none of them had experience with someone on PCP. Mulholland then took off his jacket and shirt, still leaving a T-Shirt on. Mulholland testified that he did so in order to leave the prisoner nothing to grab onto, and also because the shirt is expensive.

Mulholland testified that, when the doors were opened, and then the gates, he approached the prisoner in the wagon. Mulholland testified that she was sitting up at that point, and that he said words to the effect of, "I want you to come out, we are going to take you back in to get you treated." Mulholland testified that the prisoner then said, "no I am not coming out." Mulholland testified that he continued to urge her to cooperate, and emphasized that, "no one wants to hurt you." Mulholland testified that he reached in to grab the cuffs and that the prisoner hit his hands with the cuffs. Mulholland testified that he then said, "knock it off," and that he then reached in again. Mulholland testified that the prisoner then hit him again with the cuffs, at which point he used the palm of one hand to push her. Mulholland testified that he then said words to the effect of, "see how easy that was," trying to make the prisoner realize that it was futile to resist any further. Mulholland testified that, when the prisoner attempted to hit him a third time, he reached down and grabbed her by the ankles and pulled her out of the wagon. Mulholland testified that he used his knees to cushion her as she came out, to protect her torso and head. Mulholland testified that she was then sitting up with her back to the wagon. Mulholland testified that he and the prisoner were yelling at

each other, and that he was pushing his body weight against her shoulder and torso to convince her that "it was over." Mulholland testified that, as he was still attempting to get control, the prisoner was attempting to bring up her hands, and was trying to bite him. Mulholland testified that, at that point, he did punch her once with a fist, behind the ear, in an attempt to get her under control. Mulholland testified that this punch appeared to knock the prisoner out, and that he stepped back.

Mulholland testified that he last received training on the use of force when he was started as an officer in 1993. Mulholland testified that he believe that he complied with Directive 22 in this set of circumstances, as he used the amount of force necessary to control the prisoner. Mulholland testified that pepper spray was not an option, as he would have contaminated himself and probably other officers around had he used pepper spray. Mulholland testified that he did not have a taser.

Mulholland testified that the demotion has caused him to lose the differential in salary between an officer and a sergeant. Mulholland testified that he never served any suspension in relation to this matter.

On cross-examination, Mulholland testified that he is aware of his obligation to be familiar with Directive 22, and that he has access to the directive. Mulholland acknowledged on cross-examination that he receives a \$500 uniform allowance and a \$500.00 clothing maintenance fee under the collective bargaining agreement between the City and the FOP.

Directive 22 and the Testimony of Officer B [REDACTED]

Directive 22 was entered into evidence as City Exhibit 5. Though dated after the date of the incident in question here (12-20-10), the use of force continuum has

remained the same since the 1990's. The purposes of the directive are set forth as follows:

The primary duty of all police officers is to preserve human life. Only the minimal amount of force necessary to protect life or to effect an arrest should be used by an officer. **Excessive force and/or gratuitous use of any force will not be tolerated.** Officers should exercise all safe and reasonable means of control and containment, using only the amount of force necessary to overcome resistance. The application of force by a police officer should be guided by principles found in the "Force Continuum" which are:

- *Officer presence
- *Verbal Commands
- *Physical Controls
- *Less than Lethal Force
- *Deadly Force

City Exhibit 5 (emphasis in original)

The City called Officer C ■■■■■ B ■■■■, III, in relation to Directive 22 and the circumstances of this case. B ■■■■ is certified as an instructor in defensive tactics, physical training, firearms, urban disorder, and in relation to incident response teams. B ■■■■ was accepted as an expert in relation to the proper use of force under Directive 22 in the City of Philadelphia.

B ■■■■ testified that "everything we do is based upon what a person might do and the proper reaction to overcome that." Officer B ■■■■ testified that if officer presence and verbal commands do not work in a given situation, the officer is entitled to use force in "equal response" to the force the officer is encountering from the individual in question. As the person's use of force goes up, the officer is entitled to respond accordingly. B ■■■■ testified that physical controls would include control holds, which are borrowed from

martial arts. The notion behind control holds is to work on weak spots, e.g., the joints, to gain control. Joint locks, which involve manipulation of joints to establish control, may also be used in proper circumstances. An officer must be prepared to deal with passive resistance, e.g. person on floor and refused to get up, or active aggression, e.g. person sitting on floor takes a swing at the officer when the officer approaches. Officer B ■ testified that it is not uncommon for an officer to confront a person under the influence of drugs, including PCP. If that person is going through a psychotic episode, he or she is not going to respond to reason, and the logical progression of the use of force continuum may have to be adjusted. This does not mean that the officer should abandon the use of force continuum, but that he or she must be prepared that things could escalate quickly. B ■ also acknowledged on cross-examination that a person on PCP is not likely to experience pain and thus will not respond to ASP strikes the same way a person not under the influence would respond. In that instance, B ■ testified that the officer should immediately consider asking for a wagon and/or assistance. B ■ testified that instructors do not teach use of a closed fist in relation to force, mainly because use of the closed fist might disable the officer as bones could be broken. The officer would then be at a disadvantage in continued interaction with the person in question, particularly since most officers would use their dominant hand to strike with the closed fist. B ■ acknowledged on cross-examination that officers are not told that use of a closed fist is prohibited under circumstances where such force is necessary and appropriate.

In relation to the circumstances here, B ■ watched the video. B ■ counted four punches from Officer Mulholland. B ■ testified that he "had a problem" with the punches because he believed that other force options could have been used. B ■ testified that there were several other officers there and that such officers could have

been utilized so that such punches were not necessary. B ■ also testified that he witnessed one officer (established as Officer L ■) move in to make sure that Mulholland disengaged. To B ■ this action meant that Officer L ■ had concluded that "enough is enough." B ■ cautioned, however, that to make a truly informed judgment he would need to know "everything that was going on" as the incident unfolded. B ■ testified on cross-examination that, in order to assess whether excessive force was used, the "totality of the circumstances" had to be reviewed. In this case, B ■ pointed out in his testimony that he could not view the prisoner in the video, and that of course the actions of the person are critical to making a judgment on whether excessive force was used. B ■ also acknowledged that the video does not show whether the punches landed. On re-direct examination, B ■ testified that, assuming the prisoner was doing nothing at the time Mulholland struck her, this would pose a real problem in relation to compliance with Directive 22.

Testimony of Commissioner Ramsey

Commissioner Charles Ramsey testified that, when he became Commissioner, he altered the uniforms of supervisors, so that supervisors would be required to wear white shirts to differentiate supervisors from the rank-and-file officers, who wear blue shirts.

Commissioner Ramsey made the decision to demote Mulholland. Commissioner Ramsey testified that he also decided to suspend Mulholland for 30 days, but as stated above that suspension was never served.

In making his decision to demote Commissioner Ramsey, Ramsey considered the Internal Affairs investigation packet, and also watched the video of what transpired outside the ER at Frankford Hospital South-Aria. Commissioner Ramsey testified that he saw Mulholland using multiple strikes on the prisoner, to the point that Ramsey

viewed this as a criminal assault. Commissioner Ramsey was so concerned that he asked the District Attorney to reconsider the initial decision not to prosecute Mulholland. The DA nonetheless decided not to prosecute. Commissioner Ramsey testified that the misconduct was severe enough that he might have considered discharge had he been able to consider the matter at an earlier juncture. Commissioner Ramsey testified that a sergeant is supposed to provide a model in terms of behavior, and that in this case it was particularly disturbing that an officer actually intervened in order to keep Mulholland from striking the prisoner again. Commissioner Ramsey testified that he also viewed the fact that Mulholland removed his shirt and jacket as evidence that his use of excessive force was premeditated.

POSITIONS OF THE PARTIES (IN BRIEF)

The City's position is that the officers who testified during the City's case were obviously uncomfortable. But they told the truth. The truth is that the prisoner was combative as she was being placed in the wagon after her first treatment in the hospital. But after that point she was in the wagon alone for about fifteen minutes. This was not one continuous incident. When the grievant took her out of the wagon, after that fifteen minute period, she was on the ground and was not resisting. The officers who testified against the grievant had no reason to lie. Obviously the grievant did have a motive to lie, and he did so in relation to the incident in question. The grievant tried to paint a picture as if he was calm and rational, but he was not calm and rational when he struck the grievant three or four times with a closed fist. He violated Directive 22 when he did so. Once establishing this violation, the inquiry next turns to whether the penalty of demotion is consistent with just cause. A sergeant is supposed to be a role model, but he failed miserably in that responsibility here. In fact, an officer had to intervene to ensure

that the grievant did not continue striking the prisoner, who was not resisting at the time. The officer then made sure that the grievant remained away from the prisoner as the officers then got her on the gurney for transport inside the hospital. It is therefore ironic that the rank-and-file officer was acting in a supervisory role, to prevent the actual supervisor from escalating the matter even further. The Commissioner made his decision here, and respectfully that decision should not be disturbed.

The FOP's position is that a disciplinary demotion is rare and should be carefully scrutinized. Though the FOP strenuously urges that there was no misconduct here, even if the arbitrator concludes otherwise the grievant was not performing supervisory duties at the time of the incident. The Commissioner attempted to "stack up" the discipline here, as he decided upon a suspension and a demotion. The suspension was never issued, and cannot be issued now. For purposes of the FOP's argument, however, the Commissioner was really attempting to exact a punitive penalty on the grievant by imposing the demotion; of course discipline exacted for such purposes should never survive just cause scrutiny. The City has not met its burden of demonstrating that this is a reasonable penalty for the conduct asserted. A demotion is a very severe penalty from which in certain senses the grievant can never recover. The FOP strongly urges that, for such a demotion to be consistent with just cause, the conduct in question must relate to the supervisory duties. Such is not the case here. As to the conduct itself, it is important to realize that the subjective belief of the grievant should control here. Thus, what the other officers may have seen or believed is not necessarily controlling. The fact is that in the midst of such an incident different officers can come away from different beliefs as to what occurred. Officer B [REDACTED], for example, testified that the prisoner was lying down outside the wagon, whereas other

testimony supports the idea that she was sitting up. This does not mean anyone was lying on that issue; it is just what happens in relation to human ability to recollect events. There is no question, however, that the prisoner was violent, and likely on PCP. Officer L [REDACTED] in fact, said in his statement that the prisoner was the "most violent prisoner he had ever seen." There is no question that the prisoner attempted to bite Officer L [REDACTED] and Sergeant Mulholland. It is entirely reasonable to believe that the grievant reasonably believed that this same prisoner was attempting to bite him when he punched her once to prevent that from happening. It is also entirely plausible that, given the other honest differences in recollection in the record, that the other officers simply did not see what the grievant saw. Officer B [REDACTED]'s testimony supports the FOP's position here if in fact the grievant was acting in response to what he saw at the time. Only the grievant really had the ability to see what the prisoner was doing at the time, and it would be wrong to second guess his decision based upon a reasonable reaction to the circumstances. The grievance should be sustained.

DISCUSSION

On April 9, 2010, several police officers became involved in an incident involving a prisoner who had to be treated at Frankford Hospital South-Aria before being taken to a correctional facility. This incident resulted in the demotion of Officer Mulholland, who was a sergeant at the time. The propriety of this demotion is at issue here, in relation to just cause principles.

The evidence establishes that the prisoner was combative as she was put into the police wagon for transport to the hospital. Her combative and volatile nature was captured on video after she was initially treated at the ER and the officers were attempting to get her back into the wagon. At that time, the prisoner battled with

ferocity to avoid getting into the wagon, at one point even moving her legs under the bumper to prevent the officers from being able to get her torso up above the bumper level to get her inside the wagon. I have accepted that the prisoner was likely under the influence of PCP at the time. At that time, there were several officers attempting to get her under control, and into the wagon. Once in the wagon, I have found as fact that the prisoner, who was cuffed, was at times swinging her arms in front of her to strike the officers; using the cuffs to grab onto I ■'s leg, with the intent of then biting Officer I ■; and at times attempting to bite John Mulholland. As I ■ was forced to use his ASP in an effort to extricate himself from the hold of the prisoner, and to avoid being bitten, once the officers were able to get the prisoner in the wagon, policy then required the officers to take the prisoner back in for treatment.

Mulholland then made the decision to let the prisoner calm down while a decision was formulated for the best way to handle getting the prisoner back into the ER. The video shows that the doors were closed for approximately thirteen minutes. During that time, Mulholland made the decision to take the prisoner out of the wagon himself. At Mulholland's direction, a gurney was also rolled out to facilitate getting the prisoner back in to the ER. Before the doors and gate were opened, Mulholland removed his jacket and shirt. The doors and the gate were then opened and Mulholland moved in alone, and pulled the prisoner out by her ankles.

Although there was some testimony suggesting that Mulholland used poor judgment in relation to removing the prisoner himself, without assistance from the many officers present, Mulholland was not demoted for anything taking place prior to the time he pulled the prisoner from the wagon. Rather, the City urges that, after the

prisoner was removed from the wagon, she was sitting on the ground "doing nothing" when Mulholland struck her with a closed fist at least three times. Mulholland urged in his testimony that he struck the prisoner once, with closed fist, behind the ear, only to get her under control, as she was at the time moving to bite him.

Upon reviewing the testimony of Officer L [REDACTED], Officer B [REDACTED], and Officer S [REDACTED], and watching the video, I cannot credit Officer Mulholland's testimony. While it is obvious that the officers were reluctant witnesses here, their testimony supports the finding that, after being removed from the wagon, the prisoner was on the ground and was not resisting. Mulholland's claim that he struck the prisoner once is belied by the testimony of the officers, who all testified that he struck her more than once. The video itself shows Mulholland raising his right arm high several times, and bring that arm down in a "hammer-like" fashion each time. The manner in which he did so does not suggest that he was attempting to hit a moving prisoner who was resisting, as the arm went up and came down with precision each time. The strikes were steady and measured. The fact that L [REDACTED] then moved in to essentially pull Mulholland off of the prisoner, and then continued to "shadow" Mulholland to ensure that he did not go after her again, strongly suggests that L [REDACTED] believed that Mulholland had lost control. Had these punches taken place during the earlier attempt to get the prisoner to disengage while in the wagon, the FOP would be able to fashion a more convincing argument on Mulholland's behalf. The time lapse between these two incidents, however, was approximately thirteen minutes, during which the prisoner was in the wagon by herself. Mulholland's punches were thrown within ten to fifteen seconds from the time that he went into the wagon to get the prisoner, thus making it less likely to me that she was engaged in any resistance even while in the wagon, prior to being pulled out.


I do not envy the obligation of police officers in having to restrain themselves in these situations. After all, in addition to assaulting two police officers and a juvenile a couple of days before this incident, the prisoner then assaulted officers during this incident, and likely would have bitten Officer L [redacted] and Officer Mulholland had she been in position to do so. The prisoner's recalcitrant behavior also resulted in other officers being injured as their car was T-Boned en route to assist at Frankford Hospital. It is especially in these situations, however, where Directive 22's focus on restraint and discipline must be respected and applied. The City provides notice of expectations on this issue through initial training and through Directive 22. The most general message in Directive 22 is that the officer must use the appropriate amount of force necessary to reduce and de-escalate the threat. There was simply no threat at all at the time Mulholland punched the prisoner at least three times.

In past decisions, I have been sympathetic to FOP arguments that, where the Police Commissioner--as the decision-maker--does not testify in a just cause setting, the rights of the FOP and the grievant are compromised. Here, Commissioner Ramsey did testify persuasively as to why he demoted Mr. Mulholland from Sergeant to patrol officer. In doing so, Commissioner Ramsey stated his position that, "[Mulholland] is not the kind of person I want guiding and leading others...If you can't control yourself you cannot control others." I am not inclined to interfere with the Commissioner's discretion here.

AWARD

The grievance is denied.

Dated: July 2, 2013



Thomas G. McConnell Jr.